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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT LAMONT BROWN, Petitioner.	2 CA-CR 2007-0275-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20043536

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF GRANTED AND REMANDED

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V Á S Q U E Z, Judge.

¶1 Robert Lamont Brown challenges the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We review the trial

court's ruling for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We grant relief.

¶2 Brown was indicted on charges of kidnapping, theft, and multiple counts of armed robbery and aggravated assault. The state did not file separate, dangerous nature allegations, but the indictment included citations to A.R.S. § 13-604(I), which provides for enhanced sentences for dangerous nature offenses. Brown pled guilty to three counts of armed robbery and one count of theft by control. Consistent with the descriptions of the offenses in the indictment, the plea agreement stated that the armed robberies had been committed "with a deadly weapon or a simulated deadly weapon and/or while using or threatening to use a deadly weapon, dangerous instrument, or simulated deadly weapon." The agreement also cited § 13-604(I) among the statutes applicable to Brown's offenses, and it provided for a sentencing range for the armed robbery counts corresponding to the enhanced range for a single, nonrepetitive, dangerous nature offense. The agreement did not specify whether the robberies were or were not dangerous nature offenses.

¶3 At the change-of-plea hearing, Brown admitted having committed the robberies using a "simulated deadly weapon, basically a fake gun." The court clarified that Brown had used "a simulated deadly weapon, something that looked like a gun . . . to take property from the different people in the charges to which [Brown was] pleading guilty." The court accepted the plea and, pursuant to the state's request and the terms of the plea agreement, "incorporated into the factual basis" the grand jury transcript.

¶4 At sentencing, the trial court reviewed the charges to which Brown had pled guilty, describing the armed robberies as "class 2 felonies" but not stating whether they were dangerous or nondangerous in nature. In arguing for the maximum penalty under the plea, the state described Brown's crimes as "violent in nature, all using a gun." But the state did not object or otherwise respond when Brown's counsel characterized the gun as a "lighter gun" or as a "lighter in the shape of a gun." The court imposed concurrent, enhanced, aggravated terms of fifteen years' imprisonment for the armed robbery convictions and a consecutive, aggravated, but unenhanced term of five years' imprisonment for the theft conviction. The transcript of the sentencing hearing includes no express finding that the armed robberies were dangerous in nature, but the sentencing minute entry identifies the offenses as such.

¶5 Brown timely filed a petition for post-conviction relief arguing that his sentences on the armed robbery convictions had been illegally enhanced "because the enhancement statute does not apply to simulated weapons." *See* § 13-604(I) (providing enhanced sentencing range for offenses "involving discharge, use or threatening exhibition of a deadly weapon or dangerous instrument"); *see also* A.R.S. § 13-105(13) (defining deadly weapon as "anything designed for lethal use, including a firearm");[1] A.R.S. § 13-105(11) (defining a dangerous instrument as "anything that under the circumstances . . . is

[1]A firearm is "any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon which will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition." A.R.S. § 13-105(17).

readily capable of causing death or serious physical injury"); *State v. Joyner*, 215 Ariz. 134, ¶ 10, 158 P.3d 263, 267 (App. 2007) ("[A]rmed robbery may be committed with a simulated deadly weapon—and a 'simulated deadly weapon' may be neither deadly nor dangerous."). Brown asked the trial court to vacate all of his sentences, arguing that he should be "resentenc[ed] . . . under A.R.S. § 13-701(C)(1) and § 13-702(A)(1)" for the armed robbery convictions and that his sentence on the theft count was "connected factually and procedurally to the erroneously[]enhanced sentences for the armed robbery counts." He concedes, however, that the theft conviction "was not specifically enhanced by a dangerous nature finding." Besides the transcript of the change-of-plea hearing, at which Brown admitted having used a "simulated" or "fake gun," Brown appended to his petition his own affidavit, in which he stated that he had used "a cigarette lighter shaped like a real pistol." He also attached a copy of a police report prepared shortly after Brown's arrest in which the reporting officer noted that Brown had admitted to using a "toy gun" for the robberies in question.[2]

¶6 The state responded that the grand jury transcript provided a sufficient factual basis for a dangerous nature finding because a detective had testified that Brown had used a "handgun" in committing the offenses. It conceded, however, that the trial court had "accepted as a factual basis that [Brown had] used a toy or replica weapon." It argued that,

[2]The author of the presentence report also stated that Brown "maintain[ed] the gun was not real but a cigarette lighter."

if the court were to vacate Brown's sentences, the state should be allowed to withdraw from the plea agreement and all charges "should be automatically reinstated."

¶7 The contents of the grand jury transcript had not been discussed at the change-of-plea hearing. The only witness who had testified before the grand jury was a police detective who described the various crimes. He testified Brown had pointed a "small silver handgun" or a "silver-colored handgun" at the victims and had demanded money and/or the victims' wallets and purses. He did not testify, however, about whether the gun had been real or simulated.

¶8 Brown argued in reply that the officer's testimony did not supply a sufficient factual basis for a dangerous nature finding because the officer had not "witness[ed] the robbery or recover[ed] the pistol" and the detective's testimony, which was apparently based on surveillance photographs or victims' reports, "merely mean[t] that a realistically simulated weapon [had been] convincingly used." Brown also argued the state could not legally be allowed to withdraw from the plea agreement because he had complied with it fully and was not challenging his convictions.

¶9 In a minute entry following the parties' briefing, the trial court "acknowledge[d] the absence of an adequate factual basis to support the dangerous nature allegation and enhancement" it deemed "required" by the plea agreement. It ordered an "evidentiary hearing to determine whether the plea agreement c[ould] or w[ould] be withdrawn by the State or whether the petitioner ha[d] the right to be sentenced on the plea agreement." The court reiterated its conclusion at the subsequent hearing, stating: "I agree

there was no factual basis to establish the dangerous nature. That is beyond dispute." Apparently focusing on whether the plea agreement could be interpreted as requiring Brown to admit the dangerous nature of the armed robberies, the court continued the hearing to allow counsel to present extrinsic evidence of the parties' intent in crafting the agreement.[3]

¶10 In its under-advisement ruling following the continued hearing, however, the trial court denied relief because it determined the grand jury transcript had, in fact, provided an adequate factual basis for a dangerous nature finding. The court stated that, although "defense counsel, in his recitation of facts, indicated that the weapon used in the armed robberies was a simulated weapon, the grand jury transcripts reflect[] that a silver handgun was used during the commission of the armed robberies." Thus, the court concluded, Brown had not "sustained his burden of proving his allegations of the claimed deficiency of fact by a preponderance of the evidence."

¶11 On review, Brown first argues that the trial court abused its discretion by denying him relief "based on his failure to prove the facts underlying his claim after ruling those facts had been proven and not giving notice that those facts had become at issue when . . . Brown still had the opportunity to further prove them was itself an abuse of discretion." As explained below, however, we conclude that there was an insufficient factual basis for

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[3]The only extrinsic evidence presented at the continued hearing was a "sticky note" the prosecutor found appended to an "information sheet" in his file that stated, "Will plead to 7-10.5-21 2AR's DN & umbrella theft?" The prosecutor interpreted the note as having been "probably" based on a phone conversation he had had with defense counsel about Brown's desire to enter into a plea agreement, during which the prosecutor had "spell[ed] out the sentencing range and indicat[ed] 'DN' for dangerous nature."

the court's dangerous nature finding based on the existing record. Therefore, we need not address this argument.

¶12 "Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads." *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994). Likewise, a sufficient factual basis must exist to support sentence enhancement. *See State v. Draper*, 123 Ariz. 399, 401, 599 P.2d 852, 854 (App. 1979) (requiring sufficient factual basis for sentence enhancement based on prior conviction); *cf. State v. Quick*, 167 Ariz. 318, 322, 806 P.2d 907, 911 (App. 1991) ("The trial court abuses its discretion in aggravating a sentence without facts being established in support thereof."). "A factual basis can be established by 'strong evidence' of guilt." *Salinas*, 181 Ariz. at 106, 599 P.2d at 987. It "does not require a finding of guilt beyond a reasonable doubt," and "'a judge is not limited to a defendant's statement at the plea hearing in ascertaining a factual basis for a guilty plea.'" *Id.*, *quoting State v. Brooks*, 120 Ariz. 458, 461, 586 P.2d 1270, 1273 (1978). But the court must consider a defendant's denial of a necessary fact in determining whether strong evidence of the fact exists. *See Salinas*, 181 Ariz. at 107, 599 P.2d at 988 (in assessing adequacy of factual basis for guilty plea to possessing marijuana for sale, "trial court justifiably relied on strong evidence of guilt in the extended record that *outweighed* defendant's contradictory statements about what he intended to do with the marijuana he possessed") (emphasis added); *cf. State v. Reynolds*, 25 Ariz. App. 409, 413, 544 P.2d 233, 237 (1976) ("[W]hen a plea of guilty is coupled with a statement by defendant as to his innocence, the trial court

has a duty to inquire into and resolve the conflict between the waiver of trial and the claim of innocence.").

¶13 At the change-of-plea hearing in *Salinas*, when the trial court asked whether the prosecutor had correctly recited the facts of the offenses, Salinas replied: "The marijuana wasn't for sale, but—And the residential trespass—It's all true."[4] 181 Ariz. at 106, 887 P.2d at 987. The extended record, however, included Salinas's statement to the arresting officer that "he had been steadily selling marijuana and crack cocaine as it was the only way he knew to make money" and that he had "intended to sell [the marijuana in question] to a customer 'on the east side of town.'" *Id*. at 107, 887 P.2d at 988. Our supreme court concluded that Salinas's statement at the change-of-plea hearing had been "ambiguous" and that "the extended record reveal[ed] a sufficient factual basis to support every element of the crime of possession of marijuana for sale." *Id*.

¶14 In *State v. Freda*, 121 Ariz. 430, 432, 590 P.2d 1376, 1378 (1979), our supreme court found a strong factual basis for the defendant's plea to robbery while armed with a gun even though the defendant insisted at his plea hearing that he had used a pipe rather than a gun. There, after questioning the defendant concerning the factual basis for his plea, the trial court called the victim to the stand. *Id*. at 431, 590 P.2d at 1377. In determining that strong evidence of guilt existed in the record, our supreme court relied on the victim's testimony that he "was familiar with guns" and on his "steadfast[] assert[ion]

[4]Salinas's plea agreement required he plead guilty to residential trespass and possession of a defaced deadly weapon as well as possession of less than one pound of marijuana for sale. *Salinas*, 181 Ariz. at 105, 877 P.2d at 986.

that [Freda] had [had] a shotgun trained on him during the robbery." *Id*. at 432, 590 P.2d at 1378.

¶15 In *State v. Emerson*, 171 Ariz. 569, 571, 832 P.2d 222, 224 (App. 1992), Division One of this court found that a loaded and operable pellet gun was a dangerous instrument for sentence enhancement purposes. Emerson had argued that the record did "not indicate whether the pellet gun [used in that case] was operable and loaded." *Id*. But the court disagreed, pointing to Emerson's codefendant's statement to the victim that, "if she did not give him the money, he would 'blow' her head off." *Id*. The court reasoned that "[t]he words and conduct of the person using the gun, and presumably most knowledgeable of its condition and capabilities, clearly indicated that the gun was loaded, operable, and capable of inflicting serious or fatal injuries if discharged." *Id*. The court also noted that neither Emerson nor his codefendant had "produced any evidence to refute the above statement or the conclusion that flows logically from it." *Id*. The court found that "[c]onsequently, in the absence of contrary evidence . . . what [the codefendant] said as he robbed the convenience store would be a sufficient factual basis to establish the gun's capability of 'causing death or serious physical injury' at the time of the robbery." *Id*.

¶16 The record in this case contains no similar evidence showing that Brown used a real, as opposed to a simulated, handgun in his crimes. Brown maintained throughout the case that he had not used a real gun, and the record contains no witness statement or other evidence contradicting his claim. Although the detective used the word "handgun" in his grand jury testimony, he did not testify that the handgun had been real, nor did he have

direct personal knowledge of that fact. Indeed, as Brown points out in his petition for review, the detective had had no reason to distinguish between a real or simulated weapon because Brown's use of either would have supported the armed robbery indictments. Under the circumstances of this case, and considering Brown's consistent contention that he had displayed a simulated handgun, the detective's use of the term "handgun," without more, cannot be considered "strong evidence" that Brown had used a real rather than a simulated gun.

¶17 Because the record thus does not contain strong evidence that Brown's crimes were dangerous in nature, enhancing his sentences on that basis was illegal. *See Draper*, 123 Ariz. at 401, 599 P.2d at 854. The trial court's imposition of enhanced sentences on the armed robbery convictions was "not in accordance with the sentence authorized by law," Rule 32.1(c), Ariz. R. Crim. P.; therefore, Brown is entitled to relief under Rule 32.1(c), and the court abused its discretion in dismissing Brown's petition for post-conviction relief.

¶18 Next, we address the relief to which Brown is entitled. As noted above, Brown argues that he should be resentenced under A.R.S. §§ 13-701(C)(1) and 13-702(A)(1). He conceded below, however, that he is not entitled to sentences of less than seven years based on the sentencing range identified in the plea agreement. The state argued that it should be allowed to withdraw from the plea agreement and that the original charges should be reinstated. Indeed, "[t]he usual disposition where there is no factual basis for a plea is vacation of the plea and remand with reinstatement of charges." *Draper*, 123 Ariz. at 401, 599 P.2d at 854. But a trial court is required to reject a plea for which there is no

factual basis. *See North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970); *State v. Sullivan*, 107 Ariz. 98, 99, 482 P.2d 861, 862 (1971). Here, there is no dispute that a factual basis existed for Brown's plea to armed robbery, as that offense was described in the plea agreement. Therefore, this case is distinguishable from *Draper*, and the cases cited therein, and from *State v. Bonnell*, 171 Ariz. 435, 831 P.2d 434 (App. 1992), on which the state relied below.

¶19 A case more analogous to the situation at hand is *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (App. 2001). There, this court addressed the propriety of allowing the state to withdraw from a plea agreement when the probationary term the trial court had imposed pursuant to that agreement exceeded the term authorized by law, but no question existed as to the factual basis for the plea itself. *Id*. ¶¶ 2-5. There, we stated that, although "Rule 17.5, Ariz. R. Crim. P., gives a trial court discretion to allow either party to withdraw from a plea and to reinstate the charges in effect before the plea[,] . . . once the court accepts the plea, the state generally may not withdraw from the agreement because jeopardy has attached." *Id*. ¶ 5. We noted that "[a]n exception exists when a defendant breaches his or her obligations under the agreement," but we concluded that the defendant's challenge to the imposition of the probationary term called for by the plea agreement did not constitute a violation or breach of the agreement. *Id*.

¶20 We also addressed the propriety of allowing the state to withdraw from the plea agreement based on contract principles. *Id*. ¶¶ 9-13. "Plea agreements are contractual in nature and subject to contract interpretation." *Id*. ¶ 9; *see also Santobello v. New York*,

404 U.S. 257 (1971); *but see State v. Taylor*, 196 Ariz. 549, ¶ 8, 2 P.3d 108, 110 (App. 1999), *quoting United States v. Carrillo*, 709 F.2d 35, 36-37 n.1 (9th Cir. 1983) (courts "'not obliged to follow blindly the law of contracts in assessing plea . . . agreements'"; in some cases "'law of contracts will not provide a sufficient analogy and mode of analysis'"). But we held the state "accountable for knowing Arizona law when it negotiates, drafts, and enters into plea agreements" and determined "that the state bears the risk when, as here, a sentencing or probation provision in one of its plea agreements proves to be illegal and unenforceable." *Id*. ¶ 13.

¶21 In *Aragon v. Wilkinson*, 209 Ariz. 61, ¶ 1, 97 P.3d 886, 888 (App. 2004), Division One of this court also addressed whether a "trial court [had] abused its discretion by granting the State's motion to withdraw from a plea agreement that the court had previously accepted." Aragon had pled guilty to attempted second-degree murder and agreed to a sentencing range of seven to twenty-one years, with 10.5 years being the presumptive sentence. *Id*. ¶ 2. After the trial court accepted the plea but before the sentencing hearing, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004). *Id*. ¶¶ 2-3. When Aragon refused to waive her Sixth Amendment right to have a jury determine aggravating circumstances and the trial court "indicated that it would like to impose a sentence greater than the presumptive term," the state moved to withdraw from the plea agreement. *Id*. ¶ 4. Division One vacated the trial court's order granting that motion. *Id*. ¶ 16.

¶22 As we had done in *Coy*, Division One analyzed the issue in *Aragon* in light of "general principles applicable to plea agreements," double jeopardy concerns, and contract law. *Id*. ¶¶ 7-14. It found Rule 17.4(d) and (e), as well as a term in the agreement tracking those provisions, did not authorize the court to allow the state to withdraw because they only applied "if the court reject[ed] the sentencing provisions set forth in the agreement." *Id*. ¶ 10. And it disagreed with the state's assertion that the court had "effectively rejected the sentencing provisions . . . by expressing dissatisfaction with the constraint imposed by *Blakely*." *Id*. ¶ 9. Further, the court rejected the state's argument that application of "*Blakely* ha[d] made performance of the plea agreement impractical because the court [could] no longer impose a sentence greater than the presumptive," noting that the court was legally authorized to impose a sentence "within the range agreed by the parties and set forth in the plea agreement." *Id*. ¶ 14.

¶23 This case is similar to *Coy* and *Aragon* in that the court accepted Brown's plea after Brown had supplied a sufficient factual basis for the charges to which he pled guilty. Therefore, jeopardy has attached, and the court's discretion to allow the state to withdraw from the plea agreement is limited by double jeopardy concerns. *See Coy*, 200 Ariz. 442, ¶ 5, 27 P.3d at 801. The agreement itself gave Brown the option of pleading guilty to armed robbery by using a real *or* a simulated weapon. Thus, he had the option of pleading guilty to dangerous or nondangerous nature offenses. And although the sentencing range agreed to by the parties is identical to that statutorily authorized for dangerous nature offenses, that range also encompasses the upper statutory range authorized for nondangerous nature

offenses. *See* A.R.S. §§ 13-701(C)(1), 13-702(A)(1), 13-702.01(A)(1). Thus, the dangerous nature of Brown's offenses cannot be termed a "critical element" of the plea agreement. *See State v. Ofstedhahl*, 208 Ariz. 406, ¶ 7, 93 P.3d 1122, 1124 (App. 2004) (finding "appropriate disposition" of case in which plea agreement called for illegally enhanced sentences was "to vacate the entire plea agreement and reinstate the original charges"). The agreement here provided that "if . . . [Brown's] guilty plea is rejected, withdrawn, vacated, or reversed by any court, the plea agreement will become void and the parties to the plea agreement shall return to the positions they were in before executing the plea agreement." But Brown's plea has been neither rejected, vacated, nor reversed, and no legal basis exists to allow the state to withdraw from it. Therefore, Brown is entitled to be resentenced to a statutorily authorized sentence within the sentencing range provided in the plea agreement.

¶24 We grant relief and remand this case for further proceedings consistent with this decision.[5]

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

[5]Brown has requested we order the trial court to rule on his request to be resentenced for his theft conviction even though the court did not impose an enhanced sentence on that count. We assume the court will address Brown's request upon remand, and we express no opinion as to whether the requested relief is appropriate under Rule 32.1. Further, we express no opinion on the application of A.R.S. §§ 13-702.01 and 13-702.02 upon resentencing.

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge